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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES W. KENADY*
JOHN M. ROSS
COOPER, WHITE & COOPER
101 California Street
16th Floor
San Francisico, CA 94111
(415) 433-1900

JAMES M. WAGSTAFFE
KAUS & KERR
A Professional Corporation
155 Montgomery Street
8th Floor
San Francisco, CA 94104
(415) 981-7780
Counsel for Petitioners

*Counsel of Record

November 26, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

QUESTIONS PRESENTED FOR REVIEW

1. Does it violate the equal protection clause of the fourteenth amendment when state eminent domain procedures grant condemnors of investor-owned utilities a unilateral and unrestrained choice between two forums, only one of which allows condemnees a trial by jury and an appeal of right?

2. Shall the judiciary consider the interests affected and require more than a conceivable basis to sustain, under the equal protection clause, a state eminent domain scheme for fixing just compensation that denies access to the courts to some but not all identically-situated condemnees?

3. Despite the presence of a conceivable legislative purpose for a state eminent domain scheme prescribing judicial procedures for fixing just compensation, should the judiciary, upon reviewing a challenge to the procedures under the equal protection clause, decline to defer to the legislature when those procedures discriminate between identically-situated condemnees by denying, at the option of the state, trial by jury and an appeal of right?

LIST OF PARTIES

The parties to the proceeding below were the petitioners Jackson Water Works, Inc., and Citizens Utilities Company and respondents the City of Jackson, its city officials, Anthony Tomajevich, Dennis King, Wade Selman, Marvin Vicini, Michael Spinetti and James Buell, the Public Utilities Commission of the State of California, and its Commissioners Leonard Grimes, Victor Calvo, William Bagley, Priscilla Grew and Donald Vial.

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THE STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Jackson Water Works, Inc., and Citizens Utilities Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 8, 1986.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reported at 793 F.2d 1090, and are reprinted in the appendix beginning at A-4.[1]

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[1] An index to the materials contained in the appendix appears at the beginning of the appendix. Citation to the appendix will be to the

The memorandum decision of the United States District Court for the Northern District of California (Henderson, J.) has not been reported. It is reprinted in the appendix beginning at A-24.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1343 and 2201, 42 U.S.C. § 1983 and the Constitution of the United States, the petitioners brought this action in the United States District Court for the Northern District of California. On February 1, 1985, the district court denied petitioners' motion for summary judgment and granted respondents' motion for summary judgment. *See* A-23.

The United States Court of Appeals for the Ninth Circuit on July 8, 1986, in a 2-1 opinion, affirmed the district court. *See* A-4. On October 16, 1986, a panel of the Court of Appeals denied petitioners' petition for rehearing and, upon a call for a vote, a majority of active judges of that court voted to reject the suggestion for rehearing *en banc*. *See* A-3.

The jurisdiction of this court to review the judgment of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the United States Constitution, Amendments V and XIV; California Constitution Article I, § 19, Article VI, § 11 and Article XII, §§ 1 and 5; California Civil Procedure Code § 904.1, §§ 1230.010-1230.060 and § 1250.010; California Public Utilities Code §§ 1401-1421, §§ 1756-1757 and § 1759; and California Rule of Court 28. The pertinent text of those provisions and statutes is set forth in the appendix. *See* A-36 through A-54.

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appropriate pages, which are numbered consecutively, and which will be designated, e.g., A-4.

STATEMENT OF THE CASE

A. The Challenged Scheme Allows Condemnors Unilaterally To Choose Between Two Forums In Which The Condemnee Receives Significantly Different Procedural Rights

Petitioners Citizens Utilities Company and Jackson Water Works, Inc. ("JWW") brought this action under 42 U.S.C. § 1983 against the City of Jackson ("the City") and the California Public Utilities Commission ("the Commission") challenging on equal protection grounds a statutory scheme that confers upon local governments seeking to condemn investor-owned utilities the unfettered and unilateral election to litigate a constitutional right—just compensation—before either a California civil court or before the Commission. This choice is not reciprocal, but can only be exercised by the condemnor. The class of utility condemnees compelled to submit to an administrative proceeding before the Commission is deprived of a jury trial and any right to appeal, while the class of those whose property is taken in the courts is not.[2]

In upholding this statutory scheme, a panel majority of the Ninth Circuit characterized the differences between these two procedures as "constitutionally insubstantial," and held that the discrimination could be justified by a "conceivable" rational basis.

1. California Superior Court: Trial By Jury And Appeal Of Right Afforded To Condemnees

A California political subdivision that seeks to acquire through eminent domain the property of an investor-owned utility may institute and conduct such a proceeding in the California Superior Court. Cal. Civ. Proc. Code §§ 1230.060, 1250.010 (West 1982).

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[2] Petitioners emphasize here, as they have in the lower courts, that the discrimination permitted by California law and challenged in this proceeding is between and among two classes of utility condemnees. The issue presented by this petition is not whether California can treat utility condemnees differently from other condemnees, or, for that matter, subject them all to a proper administrative proceeding, but whether some utilities can be deprived of important procedural rights while identically situated utilities are not.

Both the condemnor and condemnee in such a proceeding are entitled unconditionally to have the compensation for the property taken determined by a jury. Cal. Const. art. I, § 19.

Each party to the proceeding is further entitled, again without qualification, to obtain review of that determination through an absolute right of appeal to the California Court of Appeal. Cal. Civ. Proc. Code §§ 904.1, 1230.040 (West 1982); Cal. Const. art. VI, § 11. Finally, the opportunity is also afforded the parties to seek review of the Court of Appeal's decision by the California Supreme Court. Cal. Rules of Court, Rule 28.

2. California Public Utilities Commission: Trial By Jury And Appeal of Right Denied To Condemnees

Other utilities, alternatively, can be forced to accept compensation for their property in an amount fixed by politically-appointed members of a regulatory agency, the Public Utilities Commission.[3] Cal. Const. art. XII, §§ 1, 5; Cal. Pub. Util. Code §§ 1401-1421 (West 1975). The utility condemnee has no opportunity to object, and no other ability to alter or affect the condemnor's choice of forum. Cal. Pub. Util. Code § 1421 (West 1975). The scheme provides neither standards governing the condemnor's choice of procedure nor limitations of any kind on that choice.

A Commission valuation proceeding is not conducted before a jury but by an administrative law judge who makes a "just compensation" recommendation to the Commission. The Commission then fixes the compensation to be paid to the utility. Cal. Pub. Util. Code § 1411 (West 1975).

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[3] A threshold distinction between the alternative proceedings involves the timing of the notice given the condemnee. In Superior Court, the potential condemnee must receive actual notice of the condemning body's hearing at which it votes whether to adopt a resolution of necessity, a statutory prerequisite to filing the action. Cal. Civ. Proc. Code § 1245.235. Defendants contended here that if the condemnor elects for commission proceedings, notice need not be given of the hearing on the resolution of necessity because the petition to the Commission did not commence a "proceeding" within the meaning of Cal. Civ. Proc. Code §§ 1235.165 and 1245.220.

The utility company's sole redress following the Commission's award is to petition the California Supreme Court for a writ of review. Cal. Pub. Util. Code §§ 1416, 1756, 1759 (West 1975). That court has discretion to deny or grant the petition. In ruling on that petition, the court does not even have before it a copy of the record below. Cal. Pub. Util. Code § 1757 (West 1975).

Any review granted is far narrower in scope than the appellate review available from a judgment of the Superior Court. The only issue which can be reviewed is whether the Commission has "regularly pursued its authority." *Id.* If the California Supreme Court denies the petition for writ of review, no written opinion is issued; the Commission's compensation finding is final; review of that finding by any other California court is prohibited. Cal. Pub. Util. Code §§ 1416, 1759 (West 1985).

Experience shows that the condemnee's opportunity to request discretionary review is not a meaningful right. The record below establishes that the California Supreme Court has not reviewed a compensation decision in fifty years and has granted review only three times in the seventy-year history of the scheme. The state Supreme Court has *never* reversed, modified or even remanded a single compensation decision of the Commission.

B. The City Elected To Proceed Before The Commission

The City chose to proceed under the alternative valuation procedure set forth in Cal. Pub. Util. Code §§ 1401-21. On April 10, 1984, the City filed a petition with the Commission setting forth its intent to acquire the property of JWW and asking the Commission to fix the amount of compensation to be paid. Prior to appearing before the Commission, JWW filed its complaint in the instant matter on June 4, 1984.

C. The Ninth Circuit Upheld The Challenged Scheme

The Ninth Circuit panel majority "assumed" that the important rights to jury trial and appeal are "constitutionally insubstantial" (A-10), and that the constitutional right to just compensation is a mere "economic" interest (A-8). In a rigid equal protection analysis, the lower court deemed itself unable to consider the significant interests affected by the state scheme.

In a dissenting opinion, Judge Pregerson rejected the notion that a jury trial and a meaningful appeal are constitutionally insubstantial. Furthermore, Judge Pregerson criticized the majority's refusal to follow two controlling decisions of this Court which hold that unequal distribution of rights to jury trial and to appeal violates equal protection. Finally, Judge Pregerson rejected the majority's rationale for the arbitrary choice given to City condemnors as having an overly attenuated connection to the statute's alleged purpose, and concluded that in practice the unfettered choice would actually be exercised to seek a tactical advantage. *See* A-16-20, and text accompanying footnote 12, *infra.*

D. The Lower Courts Acknowledged That Further Review Is Warranted

Following the entry of judgment the district court granted extraordinary relief and enjoined all Commission proceedings pending appeal. *See* A-21-22. In the Ninth Circuit the panel majority's ruling not only provoked a strongly-stated dissent but, at the request of an active judge, petitioners' suggestion for rehearing *en banc* was submitted for a vote of the active judges. *See* A-3. Again acknowledging that further review may be appropriate, the Ninth Circuit stayed the issuance of its mandate and thereby extended the district court's injunction pending this Court's final disposition of the case. *See* A-1.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PROVIDES THE COURT WITH A UNIQUE OPPORTUNITY TO ADDRESS THE INHERENT SHORTCOMINGS IN TWO-TIER EQUAL PROTECTION ANALYSIS

The Ninth Circuit adhered to a two-tiered equal protection analysis in which it could choose only between levels of review

applying either strict scrutiny or a rational basis standard.[4] The panel majority concluded that, since "no suspect class is involved and no fundamental right is burdened," it was "obligated" to apply the latter. *See* A-7. With the issue thus reduced to an exercise for imagining some "conceivable" basis for the discrimination, no matter how attenuated, a judgment upholding the state's scheme inevitably followed.[5]

A. The Important Interests Affected By The Challenged Scheme Were Not Even Considered Under The Two-Tier Analysis Applied By The Ninth Circuit

As applied by the Ninth Circuit, conventional equal protection analysis offers no room to accommodate the vitally important interests and rights that are affected by the scheme challenged in these proceedings. Rigid adherence to the lowest order of equal protection review, for example, prevented the Ninth Circuit from giving due consideration to what this Court has consistently called the important and cherished right of equal access to courts and court procedures. *See Logan v. Zimmerman Brush Co.*, 455

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[4] These two standards of review, when literally applied, have been characterized as "tautological," inflexible and outcome-determinative. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180 (1980); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting). The strict scrutiny test has been described as "strict in theory and fatal in fact," while rational basis review has been called "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

[5] Both the lower court and respondents have recognized that the statute at issue creates a classification between utility companies (*i.e.*, those brought before the Commission and those who proceed in a Superior Court). *See e.g., Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (classification may have been created "merely by the arbitrary decision of the state to seek . . . commitment under one statute rather than the other"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-39 (1982) (Blackburn, J., concurring) (classification based on timeliness *vel non* of agency's processing of claims).

U.S. 422 (1982); *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 223 (1967).

It surely requires more than a "conceivable" legislative purpose to sustain a state scheme giving the government itself, as a party litigant, the power selectively to deny its private party opponents access to a court, to trial by jury, and to appeal. This must emphatically be so in the context of an action securing an explicit constitutional right—just compensation—which the judiciary has otherwise enforced as a limitation on the power of the state.

This petition, therefore, presents the Court with an important opportunity to modify the inflexible, all-or-nothing two-tier equal protection analysis which "obligates" lower courts to characterize as "constitutionally insubstantial" salient procedural rights such as trial to a jury and to appeal, and which leaves the judiciary with no vehicle with which to assure neutral procedures for securing just compensation for private property taken by eminent domain.

1. Condemnees Are Arbitrarily Denied The Right To A Jury

Considering the overriding significance which has attached to jury trials in the jurisprudence of this Court, it is more than unfortunate that under conventional equal protection analysis that right can be characterized as "constitutionally insubstantial."[6] Fifty years ago, for example, the Court stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (citation omitted). *See also Batson v. Kentucky*, ___ U.S. ___, ___, 90 L.Ed.2d

[6] Under prior decisions of this Court, the seventh amendment does not provide a direct right to a jury trial in eminent domain proceedings. *United States v. Reynolds*, 397 U.S. 14 (1970). However, petitioners invoke the equally settled principle that even if a state is not *required* to provide a particular procedure (e.g., jury trial, appeal), if it is afforded, it must be given equally to all litigants. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972).

69, 81 (1986) (petit jury has occupied "a central position in our system of justice"); *Jacob v. City of New York*, 315 U.S. 752, 753 (1942) ("right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts"); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340-56 (1979) (Rehnquist, J., dissenting); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47 (1977); H. Kalven and H. Zeisel, *The American Jury* (1966). The value to a litigant of a jury determination simply cannot be overestimated.[7]

It is therefore beyond dispute—even if it is beneath detection using rational basis review—that the unilateral power vested in the government here to deny identically-situated property owners a jury when litigating just compensation is an injustice of constitutional magnitude. Yet under conventional equal protection analysis, it is an injustice for which there is no redress.

2. Condemnees Are Arbitrarily Denied The Right To Appeal

By the same token, this Court has consistently recognized the importance of the right to an appeal. In this instance the constraints of conventional equal protection analysis again failed to provide protection commensurate with the interests affected. *See Evitts v. Lucey*, 469 U.S. 387, 404 (1985) (appeal a "vital right"); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969)

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[7] Jurors bring common sense and community values to the decision-making process. A jury's "very inexperience is an asset because it assures a fresh perception of each trial." H. Kalven and H. Zeisel, *The American Jury*, at 8; *see also Carlson v. Green*, 446 U.S. 14, 22-23 n.10 (1980) (deprivation of jury trial in Federal Tort Claims Act renders that remedy not as effective as *Bivens*-type action); *Ballew v. Georgia*, 435 U.S. 223, 238 (1978) (Court acknowledges research that judges and juries reach different conclusions in high percentage of cases); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958) (outcome of cases may be "substantially affected" by use of jury rather than judge); *Dower v. Boslow*, 539 F.2d 969, 972 (4th Cir. 1976) (jury trial preferable to administrative judge, even if substantially higher burden of proof required of adversary in administrative proceeding).

("exercise of a right of appeal must be free and unfettered"); *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcript on appeal necessary to equalize rights of appeal); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 161 (1897) ("All litigants . . . should have the same right to appeal with others similarly situated"); ABA Comm. on Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10 commentary at 12 (right of appeal is "fundamental element of procedural fairness as generally understood in this country").

This Court has accorded great weight to appellate remedies by treating them as part of the critical right of access to the courts. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 25 n.4 (1974); *Mayer v. City of Chicago*, 401, U.S. 189, 193 (1971). In the context of a criminal case, moreover, the Court has even characterized it as "fundamental" that "avenues of appellate review . . . be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

Yet in this case, even though petitioners' challenge is to procedures for securing the constitutionally required award for a taking of private property, rights to a jury and to an appeal were relegated by the Ninth Circuit to "rational basis" review and afforded negligible weight on the scales of equal protection. Any standard of review that leads to such a result is not worthy of this Court's continuing endorsement.

B. The Court's Precedents Acknowledge That To Sustain Distinctions Affecting Significant Interests Requires More Than A Conceivable Basis

This case presents a confluence of vitally important rights—of court access and just compensation—and is therefore a unique opportunity to expand upon the recent holdings of this Court which foreshadow a departure from the two-tier, outcome-determinative equal protection standards.

For example, in *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982), the Court stated that those statutory classifications affecting enduring concerns in the Constitution, but ones not rising to the

level of "fundamental" personal rights that would otherwise invoke strict scrutiny, must reflect "a reasoned judgment consistent with the ideal of equal protection [that] may fairly be viewed as furthering a substantial interest of the State" (footnote omitted).[8]

Just last Term, a majority of justices of the Court criticized the rigid application of two-tiered equal protection analysis. The majority concluded that judicial review must consider the interests affected by—and the neutrality of—a statutory classification. In *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985), this Court held that mental retardation was not a "quasi-suspect" classification calling for a higher level of scrutiny under conventional two-tiered analysis.

In opinions in which a majority of the justices joined, however, this Court concluded that equal protection analysis must take into account the interests affected by the statute under review. 87 L.Ed.2d at 328 (Stevens J., joined by Burger, C.J., concurring) ("[T]he word 'rational' . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially"); 87 L.Ed.2d at 331 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring) ("The formal label under which an equal protection claim is reviewed is less important than careful identification of the interests at stake and the extent to which society recognizes the

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[8] *See also Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73 (1972) ("when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny"); *Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (Court should apply " 'spectrum of standards' " in equal protection analysis, and as "weight and value of the individual interest escalates, the less likely it is that mere administrative convenience . . . will be sufficient to justify" irrational discrimination); L. Tribe, *American Constitutional Law* 1089-90 (1978) ("intermediate scrutiny has been triggered if important, though not necessarily 'fundamental' or 'preferred,' interests are at stake") (footnote omitted).

classification as an invidious one").[9] The boundaries of "rational" statutory classifications, therefore, are necessarily circumscribed by an evaluation that measures the benefits and burdens of the legislation and determines whether or not the statute is fair and neutral. *Cleburne, supra,* 87 L.Ed.2d at 328-29 (Stevens, J., concurring).[10]

This Court has acknowledged that the precise level of review and the manner in which it is to be accomplished remains unsettled. *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 176 n.10 (1980); *Schweiker v. Wilson,* 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting).[11] The importance of

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[9] The Court has implicitly declined to apply the fatal "any conceivable basis" test to statutes affecting important interests. *Williams v. Vermont,* 472 U.S. ____, ____, 86 L.Ed.2d 11, 20 n.8 (1985) ("the choice of a proxy criterion . . . cannot be so casual as this, particularly when a more precise and direct classification is easily drawn"); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme") (footnote omitted); *Schweiker v. Wilson,* 450 U.S. 221, 244-45 (1981) (Powell, J., concurring) (if no legislative purpose appears "the Court should receive with some skepticism post hoc hypotheses" of government lawyers and should require a "fair and substantial relation" between the classification and the hypothesized purpose).

[10] In fashioning a constitutional rule that requires consideration of the interests affected by a statute, this Court need not write on a blank slate. In fact, this Court has for over a decade expressly weighed competing interests in analyzing whether a statutory scheme satisfies the requirement of procedural due process. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *see also Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

[11] The inadequacies of the rigid, outcome-determinative, two-tier approach have also been chronicled in scholarly commentary. L. Tribe, *American Constitutional Law* 1089 (1978); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 17-18 (1972); Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe,* 1982 Sup. Ct. Rev. 167; Goodpaster, *The Constitution and Fundamental Rights,* 15 Ariz. L. Rev. 479 (1973).

equal protection review and the Court's unmistakable suggestion of impending change in these and other decisions has resulted and will continue to result in conflicting decisions by the lower courts. *Compare Diebler v. City of Rehoboth Beach*, 790 F.2d 328, 333-37 (3d Cir. 1986) and *Coburn v. Agustin*, 627 F.Supp. 983 (D.Kan. 1985) with *Hoffman v. United States*, 767 F.2d 1431, 1435-36 (9th Cir. 1985) and *Frazier v. Heebe*, 788 F.2d 1049, 1053 (5th Cir. 1986). Accordingly, this is an important case uniquely warranting review by this Court.

C. The Ninth Circuit's Decision Results From An Inadequate Standard Of Review

The unfortunate implications of two-tier equal protection analysis and rational-basis decision-making are manifest from the result below. The Ninth Circuit felt constrained by the limitations of that test to uphold a statute which on its face empowers the government condemnor, when litigating the constitutional right to just compensation, selectively to deprive some but not all property owners of a jury trial and appeal. The scheme survives under that test even though the advantage it confers can be invoked arbitrarily and without reference to standards of any kind by the very party—the government—whose power the fifth amendment was intended to curtail.

In order to apply the rational basis standard, the Ninth Circuit majority obediently undertook a metaphysical search for some alleged "conceivable" purpose. The majority's efforts concluded with the hypothesis that the California legislature had conceivably concluded that "cities would be in the best position to choose the appropriate forum." *See* A-12. The panel majority reasoned, moreover, that even though the statute did not provide criteria to govern this arbitrary choice, and even though the "rational" exercise of that choice is delegated to municipalities, "presumably, the legislature believed that the City would exercise its discretion in an appropriate manner." *See* A-12. Such post hoc conceptualization virtually assures affirmance for the legislation under review; it is, therefore, no review at all.

The justification contrived in this case, for example, that one litigant will exercise its unfettered forum choice in a neutral

manner may be "conceivable" (very little is not), but it is supremely unrealistic.[12] As Judge Pregerson correctly observed in dissent below,

> In each case, a city will choose the forum that will produce the best result for it. If a city believes that in a particular case a jury trial will result in a lower compensation award, it will choose to proceed in a state trial court; if not, it will go to the P.U.C.

See A-20 (footnote omitted).

That the Ninth Circuit majority felt compelled to sustain the scheme in question under two-tier analysis illustrates eloquently the need for this Court to address the shortcomings of that "test."

II

DISCRIMINATORY PROCEDURES FOR AWARDING JUST COMPENSATION AFFECT MORE THAN MERE ECONOMIC INTERESTS AND REQUIRE MORE THAN PERFUNCTORY REVIEW

The right to just compensation is one which this court has long recognized as a cherished, fundamental right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980); *Duncan v. Louisiana,* 391 U.S. 145, 149 n. 14 (1968). A judicial proceeding to determine just compensation is expressly required by the United States Constitution. U.S. Const., amend. V; *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327-28 (1893).

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[12] The lower court's notion that the condemnor's unfettered choice will conceivably result in a channeling of complex valuations to the Commission is belied by the facts of this very case. Jackson Water Works, Inc., is a water company serving a small community with a population of approximately 3,000. Accordingly, this may be among the least "complicated" valuation cases. That it ended up before the Commission highlights the arbitrariness of the forum choice.

The City virtually conceded that it exercised its option in a tactical manner when it asserted the attorney-client privilege in response to an interrogatory asking it to state its reasons for electing to proceed before the Commission.

Despite the pivotal signifcance of these rights in our society,[13] under conventional equal protection analysis the Ninth Circuit found them susceptible to characterization as mere "economic" interests, and accordingly they were left unprotected. Equal protection, however, should represent an important limitation on the government's power to take by foreclosing unilateral advantages devised for itself in procedures the state enacts for fixing just compensation.

A. Rational Basis Review Of Discriminatory Procedures For Fixing Just Compensation Places The State's Power To Take Beyond Judicial Constraint

This Court should establish, therefore, a vigilant role for the judiciary through the equal protection clause in assuring the legislature's compliance with the requirements of just compensation. Such a role constitutes an essential complement to the decisions of this Court commanding the judiciary to give maximum deference to the legislature when the legislature finds that a condemnation serves a "public use" and thus claims to have satisfied the only other condition on its power to take.

The Court's decisions establish unmistakably that the role remaining for the judiciary in reviewing the legislature's claim of "public use" is "extremely narrow." *Berman v. Parker*, 348 U.S. 26, 32 (1954). The test to be applied by the courts in fulfilling

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[13] This Court has often underscored the significance of these interests. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) ("Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole"); *see also Penn Central Transportation Co. v. New York*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (just compensation clause intended to prevent government from invading private rights); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327-28 (1893) ("right of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case . . . *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution") (emphasis added).

that narrow role is, significantly, the same rational basis test just employed by the Ninth Circuit, *i.e.*, whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose. . . ." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). If both the "public use" limitation on the power to take and the procedures for fixing the amount of just compensation on which that power is conditioned are subject only to minimal review, then the Court will have effectively placed the power of eminent domain beyond judicial supervision.

B. Judicial Deference To The Power To Take Must Be Accompanied By Judicial Scrutiny Of Procedures Which Purport To Yield Just Compensation

The Court, however, has taken care to emphasize that the sweeping latitude it affords to legislatures to invoke the power to take and to determine what is a public use is predicated on the payment of just compensation. *See, e.g., Midkiff, supra*, 467 U.S. at 245 (O'Connor, J.) ("[W]e assume . . . that the weighty demand of just compensation has been met . . ."). Since this Court broadly construes the government's extraordinary power to take as extending to any "conceivable" legislative purpose, then countervailing rigor is plainly needed whenever the judiciary reviews the procedure by which the sole remaining condition to that power—the payment of just compensation—is purportedly satisfied.

Neutral procedures afforded all parties in fixing the amount of just compensation, therefore, provide above all the protection under our system for property subject to the government's power to take. This Court should grant review to confirm that an evenhanded *procedure*, vigilantly enforced by the judiciary through the equal protection clause and free of governmental self-dealing, is the source of the justice underlying "just" compensation.[14]

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[14] Consideration of the strong societal interest in fair procedures for determining just compensation is especially appropriate since here one litigant loses a jury trial. For this Court has stated that "the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable

III

THE JUDICIARY MUST NOT DEFER TO "CONCEIVABLE" JUSTIFICATIONS FOR DISCRIMINATORY LEGISLATION AFFECTING JUDICIAL REMEDIES

The Ninth Circuit felt constrained to hold under conventional equal protection analysis that even governmental self-dealing in allocating procedural advantages cannot be redressed under the equal protection clause, even if the procedures, such as jury trial and appeal, are substantively significant, and even if the litigation is addressed to issues of constitutional stature. There should be no resort, however, to stratified degrees of review when the judiciary passes upon legislation that purports to prescribe judicial procedures. The Court should grant review to establish that the legislature cannot broker judicial procedures to confer on only one party a unilateral advantage, much less may it do so in the state's self-interest.

A. Procedural Rights Are Judicial Guarantees, Not Legislative Distinctions

Traditionally, and properly, courts have given state legislatures wide latitude in the regulation of their local economies and social welfare. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). This deference is predicated on the theory that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of *legislative* policy determinations." 427 U.S. at 303 (emphasis added).

Whatever deference or immunity might be warranted for classifications drawn on substantive economic or social grounds, it is the judiciary's proper role to intervene when a state legislature discriminates in disbursing *procedural* guarantees, particularly when it does so in favor of the state itself. Not surprisingly, the decisions of this Court give substantially less deference to legislative classifications that affect judicial procedures.

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resolution of factual issues." *Colgrove v. Battin,* 413 U.S. 149, 157 (1973) (citation omitted).

Justice Harlan, in his concurrence in *In re Gault,* 387 U.S. 1 (1967), described the Court's more active role in reviewing statutes that affect procedural rights:

> This principle [wide deference to legislative judgments] does not, however, reach all the questions essential to the resolution of this case. The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence.

398 U.S. at 70 (Harlan, J., concurring in part, dissenting in part).

B. The Court's Precedents Require That Significant Judicial Procedures Be Free Of Arbitrary Distinctions

This court has, without acknowledging it expressly, adhered to the wisdom expressed in Justice Harlan's conclusion. In *Lindsey v. Normet,* 405 U.S. 56 (1972), for example, this court rigorously examined a statutory restriction on appeals and was unwilling to accept several proffered justifications, even though they might technically have formed a conceivable basis for the legislation. Similarly, in *Humphrey v. Cady,* 405 U.S. 504 (1972), this Court closely scrutinized a restriction on access to a jury trial, even though in that case trial by jury was not constitutionally mandated. The Court refused to accept the "conceivable" rationale that the prosecutor would fairly distribute this right.

In *American Motorists Insurance Co. v. Starnes,* 425 U.S. 637 (1976), this Court made it clear that if a procedure is significant to the result, but applies unequally, the statute violates the equal protection clause. In *Starnes,* this Court strongly implied that if one class of litigants was required to make a meaningful prima facie showing to satisfy venue requirements, while a similarly-situated class of litigants was not, the procedural scheme would violate equal protection under any standard of review. 425 U.S. at 642-45; *see also* 425 U.S. at 648 (Burger, C.J., concurring).[15]

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[15] These same considerations led this Court to conclude that the right to a jury trial is in effect to be treated as "substantive" and thus

This Court's decisions, therefore, adhere to the principle that, when procedures are afforded unevenly, particularly procedures of such significance as jury trial or an appeal, legislatures will not enjoy the constitutional leeway accorded in other contexts. Different "tiers" of analysis need not be invoked. In short, the sufficiency and constitutionality of judicial procedures is an issue that deserves judicial, not legislative, resolution.[16]

C. Review Of This Case Would Address Questions Of Timely Importance

This very case, involving as it does issues of constitutional dimension relegated unequally to administrative resolution, raises questions that deserve elaboration in light of the Ninth Circuit's opinion and the proliferation of state administrative remedies created in response to various "crises" (*i.e.*, court congestion, medical malpractice). Specifically, this Court has yet to rule that, in creating procedural remedies, legislatures must not favor only

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guaranteed under the *Erie* doctrine. *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958). Requiring equality in treatment as to procedural rights which are "substantive" for *Erie* purposes might be a workable test for determining which kinds of "procedures" must be afforded equally.

[16] Time-honored decisions of this Court have implicitly recognized this distinction by invalidating state procedural schemes on equal protection grounds. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) (foreign corporations alone subject to suit in all state venues); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923) (onerous discovery requirements imposed on only one class of litigants); *Atchison, Topeka & Santa Fe Railway Co. v. Vosburg*, 238 U.S. 56 (1915) (discrimination in eligibility for attorney's fees). Some lower courts have adhered to this implicit principle, while others have felt constrained under the two-tiered approach to give complete deference to state legislatures. Compare *Miller v. Jordan*, 472 P.2d 841 (Oregon 1970) (state statute providing for advance jury fees in some cases but not others denies equal protection), and *Kansas City v. Webb*, 484 S.W.2d 817 (Missouri 1972) (en banc), *cert. denied*, 409 U.S. 851 (1972) (city charter granting only corporate condemnee the option of a six- or twelve-person jury violates equal protection), with *Chrysler Corp. v. Texas Motor Vehicle Com'n*, 755 F.2d 1192, 1201 (5th Cir. 1985) (plaintiff given sole access to de novo action in district court).

one of the parties with a choice of forum, or that the equal protection clause requires equal access for equally situated litigants to administrative agencies or, as in this case, to the courts.

The facts of this case, however, are especially compelling: even though the proceedings in question are convened to vindicate a citizen's fundamental constitutional right (*Webb's Fabulous Pharmacies v. Beckwith, supra,* 449 U.S. at 160), the legislature has conferred the advantage here on the government itself. The Court should grant review to establish that deference to the legislature implemented through varying "levels" of scrutiny is inappropriate where it enacts substantive procedures controlling significant interests for the state's unilateral advantage.[17]

IV

THE NINTH CIRCUIT'S ASSUMPTION THAT THE RIGHTS TO A JURY TRIAL AND TO AN APPEAL ARE CONSTITUTIONALLY INSUBSTANTIAL IS IN DIRECT CONFLICT WITH PRECEDENTS OF THIS COURT

The Ninth Circuit assumed that depriving one class of litigants of a jury trial and an appeal affects rights which, for purposes of equal protection analysis, are "constitutionally insubstantial." *See* A-10. This conclusion flatly contradicts at least two equal protection holdings of this Court.

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[17] The Court has already agreed to review a case that focuses also upon the constitutionality of a statutory scheme that allegedly discriminates between litigants with regard to appellate rights. *Burlington Northern R.R. Co. v. Woods,* No. 85-1088, *cert. granted,* Mar. 24, 1986. That case raises an equal protection challenge to a state statute that imposes a penalty on defendants unsuccessful on appeal but no corresponding penalty on unsuccessful plaintiffs. If the Court strikes down the statute in *Burlington Northern*, that disposition would seem to compel reversal in this case. It is important to note, however, that the scheme challenged here contains greater inequalities affecting more and different rights than the statute in *Burlington Northern*; accordingly, a decision upholding the *Burlington Northern* statute by no means compels or even suggests affirmance in this case.

This Court has consistently held that appellate rights are significant procedures for purposes of equal protection analysis. *Lindsey v. Normet*, 405 U.S. 56 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 153 (1897). In *Lindsey*, for example, the Court held unanimously in an opinion written by Justice White that while there was no general constitutional right to an appeal,

> [W]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.

405 U.S. at 77 (citations omitted).

Similarly, the Court struck down on equal protection grounds a statute affecting the availability of trial by jury. *See Humphrey v. Cady*, 405 U.S. 504 (1972). In *Humphrey*, another unanimous decision, this Court held that a state could not, consistent with equal protection, arbitrarily grant one set of defendants a jury trial while denying that right to other, similarly situated defendants. 405 U.S. at 512.

The lower court acknowledged that the holdings in *Lindsey* and *Humphrey* "offer JWW substantial support for its position." *See* A-12. However, the lower court then remarkably and erroneously rejected them as inapposite. The lower court's failure to distinguish those holdings is fully and convincingly discussed in the dissenting opinion of Judge Pregerson below. *See* A-18 through A-20. That the lower court committed this error at the expense of trial by jury, the right of appeal, and procedural fairness when the government exercises the constitutionally limited power to take, makes this case an important occasion for review by this Court.

CONCLUSION

The lower court's conclusion that the government as a litigant can unilaterally confer or withhold a private party's rights to a jury and to an appeal, even in a proceeding required by the Constitution, deserves to be repudiated. This Court should grant review to reexamine the equal protection standards under which this conclusion was reached.

Review by this Court is especially warranted if the Court strikes down the statute challenged in *Burlington Northern R.R. Co. v. Woods*. *See* footnote 17, *supra*.

This Court should declare that the right to exercise or deny pivotal procedural advantages, and the power to allow or foreclose access to the courts, cannot be conferred by the legislature on one party exclusively, particularly where that party is the government itself as the adversary of its constituents in litigation of constitutional issues.

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Respectfully submitted,

CHARLES W. KENADY*
JOHN M. ROSS
COOPER, WHITE & COOPER

JAMES M. WAGSTAFFE
KAUS & KERR
A Professional Corporation
Counsel for Petitioners

* *Counsel of Record*